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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 486

LESTER FOLLETT,

Appellant,

vs.

TOWN OF McCORMICK, SOUTH CAROLINA.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA.

STATEMENT AS TO JURISDICTION.

GROVER POWELL,
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STATEMENT AS TO JURISDICTION.

In compliance with Rule 12 (1) of the Rules of the Supreme Court of the United States, as amended April 6, 1942, appellant files a *statement as to jurisdiction* disclosing the basis upon which it is contended that the Supreme Court has jurisdiction upon appeal to review the judgment in question.

Statutory Provisions Sustaining Jurisdiction.

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 (a) of the Judicial Code [28 U. S. C. 344 (a)].

Under Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error.

South Carolina Legislation Questioned.

In this case the validity of a certain ordinance of the Town of McCormick, South Carolina, is called into question as being unconstitutionally construed and applied to the facts and circumstances of this case. The questioned ordinance reads:

> "BE IT ORDAINED by the Town Council of the town of McCormick in council assembled, and by the authority of the same:
>
> "SECTION—. That the following license on business, occupation and professions to be paid by the person or persons carrying on or engaged in such business, occupation or professions within the corporate limits of the Town of McCormick, South Carolina:
>
> "Agents selling books, per day $1.00, per year $15.00."

Timeliness.

The Supreme Court of South Carolina, the highest court in the State of South Carolina to which an appeal could be taken in this case, entered its judgment and opinion on August 26, 1943. (See the entire opinion and judgment attached hereto as Appendix.) The petition for appeal and other papers required by the rules of this Court are filed within three months from the date such judgment became final, and hence this appeal is timely made.

Opinions.

The opinion of the Supreme Court of South Carolina is attached hereto as Appendix to this statement.

Statement of Nature of the Case and Rulings of Court Bringing Case Within Jurisdiction Provisions Relied Upon.

The appellant was charged by complaint with a violation of the ordinance of the Town of McCormick hereinbefore mentioned. He was brought to trial before a jury on March 21, 1942 in the Mayor's Court of the said Town of McCormick. He was found guilty and sentenced to pay a fine of Fifty Dollars or serve twenty days in jail (R. 9 fol. 37). He appealed from this judgment and sentence and his case was thereafter heard in the McCormick County Court of General Sessions. On November 2, 1942, the County Court affirmed the conviction (R. 9-17). Appellant timely filed his appeal to the Supreme Court of South Carolina, and by way of a Bill of Exceptions raised objections to this judgment on the grounds that it was in violation of the First and Fourteenth Amendments to the Federal Constitution in that it deprived him of the free enjoyment of his rights of freedom of speech, freedom of press, and freedom to worship ALMIGHTY GOD as His minister. The Supreme Court of South Carolina considered these objections and placed its construction on the constitutional provisions in question, under which appellant's conviction was affirmed (R.—).

Statement of Facts.

The evidence in the trial court was for the most part in accord and not in dispute. It appears that appellant was and is an ordained minister of the gospel, working under the direction of the Watchtower Bible and Tract Society, Inc., of Brooklyn, New York, as one of Jehovah's witnesses. This Society, as the record in the Supreme Court of South Carolina showed, is a charitable corporation organized under the membership corporations law of New York, and is incorporated to publish Bibles and Bible litera-

ture, and to appoint, ordain and maintain ministers of the gospel (R. 1, fol. 7; R. 2, fol. 9, 12; R. 3).

The appellant, at the time of his arrest, was distributing literature dealing with Biblical subjects published by the aforementioned Society in the manner prescribed by that organization for the dissemination of the gospel message. This distribution of Bible literature was only an incidental part of his ministerial duties (R. 1, fol 8; 6, fol. 27).

A witness in the trial court testified that she gave appellant twenty-five cents, and he left with her a clothbound book of 384 pages, entitled *Children*, a book devoted to an explanation of Bible history and prophecy (R. I, fol. 8). Appellant contended that he explained to this witness at the time she gave him the money that the twenty-five cents was regarded as a contribution which would be used to defray the cost of printing more books of like kind to be used in teaching God's Word to others (R. 2, fol. 9). It was established that appellant was calling on all of the residents of the Town of McCormick, offering to leave this book with them if they cared to read it (R. 6, fol. 28).

The evidence shows that appellant distributed this literature by calling upon the people at their homes and offering to leave the book with them if they cared to read it. Always the householder was given the opportunity to make a small contribution as did the witness just mentioned, for the purpose of aiding to print other like literature. If the person did not have any money, but expressed a desire to have the book and read the same, it was left without additional or any contribution. Appellant said that he carried with him in this work a certificate of ordination issued by the Watchtower Bible and Tract Society identifying him as an authorized representative of said Society and establishing his status as an ordained minister. This certificate

appears in the Record at pages 2 to 4. This certificate reads in part:

> "This is to certify that Lester Follette whose signature appears below, is an ordained minister of Jehovah God to preach the gospel of God's kingdom under Christ Jesus and that said person is one of Jehovah's witnesses. The Watch Tower Bible and Tract Society, created and organized by law to preach the gospel of God's Kingdom, sends forth Jehovah's witness to do this work as commanded by the Almighty God. Jehovah's witnesses are ordained and commissioned by God, and the signer of this card Scripturally claims such ordination and commission, as set forth in the Bible at Isaiah 43:9-12; Matt. 10:7-12; Matt. 24:14; Acts 20:20; 1 Peter 2:21; 1 Cor. 9:16. Being one of Jehovah's witnesses, in obedience to God's commandments, preach the gospel and worship Almighty God by calling upon people at their homes, exhibiting to them the message of the gospel of said Kingdom in printed form. Bibles, books, booklets, and magazines are offered free to those that are poor, or on contribution, which contribution is accepted for the publishing of other literature so that the Word of the Lord may have greater circulation in all this world for a witness, giving other people the opportunity of learning of God's gracious provision for them. Said witness of Jehovah is doing this work of his own volition and is bearing the testimony before the people in accordance with the fundamental laws of this land and in obedience to God's commandment, which is supreme. • • •
>
> "Watchtower Bible and Tract Society.
> "By: N. H. Knorr, *President*.
>
> "Lester Follette, McCormick, South Carolina."

Appellant was a resident of the town of McCormick. He did not obtain the license required for peddling as the police insisted he must for the reason, as he contended, that he was

not a peddler, salesman, or hawker of anything, but that he was an ordained minister of the gospel engaged in the charitable and Christian activity of carrying God's Word to the people (R. 6, fols. 27, 28, 29).

Grounds and Decisions Sustaining the Jurisdiction and Showing That Substantial Federal Questions Are Involved.

The ordinance is unconstitutional as construed and applied to appellant's activity because it abridges and burdens appellant's exercise of the rights of freedom of speech and press and freedom to worship ALMIGHTY GOD *as His minister preaching from house to house, contrary to the First and Fourteenth Amendments to the United States Constitution.*

Murdock v. *Pennsylvania*, 319 U. S. —, 63 S. Ct. 870;
Jones v. *Opelika*, 319 U. S. —, 63 S. Ct. 890;
Martin v. *Struthers*, 319 U. S. —, 63 S. Ct. 862;
Largent v. *Texas*, 318 U. S. 418;
Jamison v. *Texas*, 318 U. S. 413;
State v. *Meredith*, 197 S. C. 351, 15 S. E. 2d 678.

Discussion of Law in Question and of Federal Questions Presented On This Appeal.

The Record in this case is identical in every material respect to that presented to this Court in the case of *Murdock* v. *Commonwealth of Pennsylvania*, decided May 3, 1943, cited as 319 U. S. —, 63 S. Ct. 870. This case presents no new issue that was not presented and decided in the *Murdock* case. Here again the single question is involved: "Does the exaction of a peddler's occupational license tax, when applied to the work of Jehovah's witnesses preaching the gospel from door to door by distribution of books containing printed Bible sermons, violate the First and Four-

teenth Amendments to the Federal Constitution?" In the *Murdock* case this Court answered that question in the affirmative. The court below in the instant case has answered it in the negative, directly overruling and avoiding the principles of law set down by this Court, saying "It seems, and is, a very far cry from the import of the foregoing clause [of the First Amendment] to the occupational license ordinance in question."

The learned court below after sympathetically reviewing the holding of this Court in the original decision made in the case of *Jones* v. *Opelika*, 316 U. S. 584, observes that this Court "'went up the hill and down again'" when it vacated the rule laid down in the *Jones* case and acted to "restore to their high, constitutional position the liberties of itinerant evangelists who disseminate their religious beliefs and the tenets of their faith through the distribution of literature." Then, conceding that this Court's opinion and judgment is "controlling upon us", the court below then avers: "The facts of the *Murdock* case are materially unlike those of appellant's. * * * we think the sales proven were more commercial than religious. The license was required for the selling of books, not for the spreading of religion."

This holding, however, is but a mere parody of the holding of this Court in the reversed and vacated opinion of *Jones* v. *Opelika*, *supra*, wherein it was said: "But it is because we view these sales as partaking more of a commercial than religious or educational transactions that we find the ordinances, as here presented, valid. A tax on religion or a tax on interstate commerce may alike be forbidden by the Constitution. It does not follow that licenses for selling Bibles * * * must fall."

A close examination of the records in the *Jones*, *Murdock*, and other cases decided by this Court at the same time, reveals that work being done by those petitioners was in

every respect exactly similar to the appellant's activity here. The presumption indulged by the court below that all the petitioners were "itinerant" in the *Murdock* cases is not justified by the facts in those cases. Therefore when this Court reversed its first holding in the *Jones* case, holding that the work of Jehovah's witnesses was not "commercial" but was a "religious venture", that opinion swept away completely the argument now advanced by the court below. Consider these trite words of Mr. Justice Douglas in the *Murdock* case:

> "But the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. * * * It is plain that a religious organization needs funds to remain a going concern. But an itinerant evangelist, however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him. Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way."

This, we submit, disposes of the view taken of the appellant's work by the Court below. If sustained, then this judgment would give the courts the power to examine each individual clergyman within their jurisdiction who might be brought before them as was the appellant here, for the purpose of ascertaining and deciding whether his preaching work was done for commercial or religious purposes.

Apparently the court below has already decided that ministers, evangelists and preachers who are residents of towns and who earn their living by preaching the gospel to the people are engaged in a taxable commercial activity. Thus, as suggested by this Court, every minister who allows

a collection plate to be passed in his church, at once becomes liable, under this judgment, for the payment of the peddler's license tax. Also, as observed by the Supreme Court of Louisiana in the case of *Shreveport* v. *Teague*, 200 La. 679, 8 S. 2d 640:

> "The fact that relator, as an incident to his preachings, attempts to sell literature which is conformable with his religious beliefs does not alter the nature of his profession or make him a solicitor, hawker or itinerant merchant. * * * To hold otherwise we would be compelled to attribute to the City Council of Shreveport the intention of declaring that the visitation into homes (without previous invitations) by priests and ministers of all religious denominations, accompanied by the sale of Biblical literature constitutes a nuisance and a misdemeanor. This we will not do."

Merely because the court below in this case did not manifest that compunction shown by the Louisiana court, is no reason why this Court should not do as it has been called upon to do in many other cases—set aside the conviction and protect the constitutional right, which is otherwise infringed upon and destroyed beneath the burden of governmental taxation.

The court below has decided that ministers in South Carolina enjoy a "complete freedom of religion", but then holds that this freedom does not allow a minister devoting his full time to preaching the gospel in his chosen way, that is by the distribution of printed Bible sermons in book form, to avoid the payment of "the moderate license of $15.00 per year prescribed by the ordinance under attack". This conclusion is reached in spite of the court's finding that the book CHILDREN distributed by appellant is a "religious book" and that its "publication and distribution come within the meaning of the words, 'exercise of religion', as they are used in the constitution." Thus

the situation is that the Supreme Court of South Carolina has sustained a flat occupational tax applied to the most cherished "privilege granted by the Bill of Rights". In direct contradiction to the legality of such a holding, the majority of this Court said in the *Murdock* case:

> "A state may not impose a charge for the enjoyment of a right granted by the federal constitution. • • • A license tax applied to the activities guaranteed by the First Amendment would have the same destructive effect. • • • The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down." [Citing cases.]

The court below seeks to distinguish the *Murdock* case from the one at bar by saying that this Court "had in contemplation an itinerant preacher" but this case "does not involve an itinerant". Note that the learned court does not, as indeed it cannot, hold that appellant was not a minister and a preacher. The whole basis of the opinion is that the *Murdock* opinion includes only those nomadic persons who travel from town to town without ever acquiring and caring for a congregation in a fixed location, and that the *Murdock* decision excludes from the protection of the First Amendment local clergymen and pastors. It is unnecessary to go into any detail as to the definition of the terms involved to show the fallacy of such an arbitrary and discriminatory classification. Indeed if such a distinction were observed, then it must fall under the specific terms of the "equal protection" clause of the fourteenth amendment.

The sophistry of such a distinction would immediately lead to an endless maze of hairline situations. When does a minister cease to become an itinerant and subject to a tax of a town where he might be distributing his books and tracts? Will he be allowed to call on each person in the

town once? or twice? or three times? In a city the size of New York he could make more than seven and a half million calls without ever calling on the same person twice. Would he be exempt from such taxation as here involved even though it took him a lifetime to make all these calls? How much of the local clergyman's activity is "religious" and how much is "commercial"? And so forth *ad infinitum*. The answer these impossible propositions deserve is that no such arbitrary distinction can exist under the broad provisions of the First Amendment. A nomadic evangelist has no more right under the constitution to protection from municipal taxation than does a resident clergyman.

We submit that this Court has construed the First Amendment to protect the distribution of just such literature as is here involved, from the confiscatory and burdensome license tax sought to be imposed upon appellant's activity. Just as was said in the *Murdock* case:

> "The hand distribution of religious tracts is an age-old form of missionary evangelism. • • • This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press."

This makes it clear then, that the basis upon which the *Murdock* case rested was the protection of the cherished constitutional right to distribute religious literature free from the burden of taxation, rather than protection of only a certain group of nomadic evangelists.

In passing, it is noteworthy to observe that the Supreme Court of South Carolina overruled its own precedent established in July of 1941, in the case of *State* v. *Meredith*, 197 S. C. 351. This Court in the *Murdock* opinion cited this

very case as authority for the proposition that the activity of Jehovah's witnesses in distributing literature did not constitute a commercial rather than a "religious" venture. This Court agreed with the finding and conclusion of the South Carolina Supreme Court that:

> "• • • the 'sale' of the book by defendant was merely collateral to the main purpose in which he was engaged, which was to preach and teach the tenets of his religion."

In the *Meredith* case the court below says that it found no "profit motive" involved, but here there was such a motive, and it was that motive that sustained the application of the tax. The court below hangs this proposition on the only peg left sticking out of the *Murdock* opinion wherein it was said: "Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital."

For the purposes of argument, let it be assumed that the finding of the court below was not (as it actually is) a "distortion of the facts of record" in holding that the activity of appellant was commercial rather than "religious". Appellant vigorously contends that in spite of such a view of his activity, he is still within the protection afforded by the First Amendment to the institutions of freedoom of speech and freedom of press.

The reason is both manifest and elementary. The fundamental rule is stated in the *Murdock* opinion: "*A state may not impose a charge for the enjoyment of a right guaranteed by the federal constitution.*"

One of the greatest industries in the world is the newspaper and magazine industry. In every community of the land, the people are informed on every conceivable matter of public concern. Only a tiny fraction of this great in-

dustry is done because of benevolent or charitable reasons. For the most part the *profit motive* is the basic inspiration of the industry. Yet no one would assert that this great industry because of that fact was not in the fullest sense exercising its right of "freedom of the press". Thus the use of the word "press" in the federal constitution necessarily means and includes not only the "religious presses" or the "charitable presses" but the term "freedom of the press" embraces *all* of the the public press. WHY?

By the fundamental document called the "Constitution of the United States" THE PEOPLE secured to themselves certain rights which have been termed *inalienable rights.* The benefit which ultimately accrues to the people is the real "freedom" protected by the First and Fourteenth Amendments. The founding fathers of this country envisioned that every person should have not only right of freedom of press, but the right of *freedom to read;* not only the right of freedom of speech, but the right of *freedom to listen;* not only the right of freedom to worship God as His minister, but the *right to have God's Word explained to him.* Only when the freedoms are thus viewed do they have any real meaning at all.

Thus, the freedoms in the First Amendment cannot be measured by the character of the moving parties involved. In each case the real test is the consideration and determination whether or not the article or service delivered to the people of the United States falls into any one of the categories specified by the constitution. If the article or service is found to be one of those things which the PEOPLE have secured unto themselves by the constitution, then such article or service is beyond the reach of the federal or state governments' control up to the point where the police power necessitates interference.

When this common-sense view is taken of the First Amendment, and aside from all the many supporting

precedents announced by this Court, it will be found that regardless of the fact that many presses or as the fact of the matter is, *most* presses turn out the printed page primarily for the profit that will be derived therefrom, still the PEOPLE are protected in their right to receive the benefits of the printed page. Suppose that appellant here was motivated solely by the most selfish of desires for personal enrichment in distributing the book CHILDREN to the people. Assume further that the book contained information of the most vital and important character for the public benefit. Could it possibly be contended that the municipality by way of burdensome taxation upon the appellant's "commercial" distribution of the religious book, could constitutionally deprive the people of their right to have this information? If a householder wants the information contained in a book, what difference could it possibly make to him that the person bringing it to him is inspired by commercial rather than religious motives? As far as the constitutionally protected benefit to the people is concerned, what difference does it make that the transaction partakes more of a "commercial than religious or educational transactions"? The compelling answer is NONE!

The same rules would apply to the freedom of speech. Can a municipality levy a flat tax upon the occupation of persons making political speeches because they do so to earn money rather than to benevolently educate the people? Can such a tax be levied upon a preacher because he preaches to provide his own living rather than for the benefit of his congregation's souls? No court would sanction such an arbitrary and factitious basis for the levy of the tax.

When the State of Louisiana levied a two per cent tax upon the gross receipts of newspapers taking commercial advertising, this Court in the case of *Grosjean* v. *American*

Press Company, 297 U. S. 233, held that the tax was unconstitutional for the reason that the tax:

> "• • • operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising; and, second, its direct tendency is to restrict circulation. This is plain enough when we consider that, if it were increased to a high degree, as it could be if valid (*Magnano Co.* v. *Hamilton*, 292 U. S. 40, 45, and cases cited), it might well result in destroying both advertising and circulation."

This case is directly in point here if the finding of fact made by the South Carolina Supreme Court is correct and the work of appellant was commercial rather than "religious"; and this *Grosjean* case cannot be avoided.

As a further consideration it will be observed that if a license tax can be applied to the activity questioned, then the municipality has the correlative right to censor and license, control and suppress such activity without encountering any constitutional difficulty. This Court in the cases of *Lovell* v. *Griffin*, 303 U. S. 444, *Schneider* v. *State*, 308 U. S. 147, *Cantwell* v. *Connecticut*, 310 U. S. 296, *Jamison* v. *Texas*, 318 U. S. 413, and *Largent* v. *Texas*, 318 U. S. 418, has struck down the evil of "administrative censorship" of "religious publications". It is interesting to note that the *Schneider*, *Jamison* and *Murdock* cases all specifically disclaim having any effect on "commercial" solicitation or distribution, which might be taken as an indication that had it been determined that the publications in question were not "religious" then the ordinances in each instance would have been held constitutional as in the case of *Valentine* v. *Chrestensen*, 316 U. S. 52.

Appellant respectfully contends that the freedoms secured to the people under the First and Fourteenth Amendments are too precious and fundamental to the success of democracy to be based on such a shallow foundation as would

allow them to exist only where they do not partake of any "commercial" characteristics. There are almost no undertakings or ventures that do not in some way "partake of commercial characteristics". "Records of fact" are too easily distorted by courts and juries, and if this judgment is allowed to stand together with the previous pronouncements of this Court to like effect, then a way has been found to censor, license and suppress the public press. It is high time for this Court to declare finally and forcefully that the institutions of freedom of press and freedom of speech belong to the people, FREE from any burdens of previous restraints such as censorship or taxation, and that these freedoms are not to be chiseled away and watered-down just because commercialists make use of them. No logical reason can exist why a newspaper must be subject to municipal censorship ordinances or tax ordinances just because it carries a commercial advertisement or even if it is one hundred per cent advertisement and each copy is sold for a profit. If it carries matter of public concern and interest, and does not transcend the limits which must be drawn under the police power, then it is equally entitled to the protection of the First Amendment along with a clergyman's Sunday morning sermon.

It is sufficient for the purposes of this Statement merely to list a few of the cases decided by this Court which will substantiate appellant's contention in this behalf:

California v. *Central Pac. R. Co.*, 127 U. S. 1;
Collector v. *Day*, 11 Wall. 113;
McCulloch v. *Maryland*, 4 Wheat. 316.

Summarizing, appellant's contention is that this case is factually the same as the *Murdock* case and should be disposed of on the basis of that judgment. However, if it is found that the Supreme Court of South Carolina is right, and this case falls within the exception announced in the

Murdock case allowing the application of license taxes upon commercial distribution of literature, then it is still the duty of this Court to note jurisdiction in the case for the reason that such holding is a misconstruction of the First and Fourteenth Amendments to the Federal Constitution.

Conclusion.

For sake of brevity, reference is here made to the Petition for Appeal filed in this cause, with which we incorporate by such reference, each and every assignment of error therein contained and hereby make the same a part hereof to show that substantial federal questions were presented before the Supreme Court of South Carolina.

WHEREFORE, the Supreme Court of the United States should note jurisdiction of this cause for final hearing in accordance with the rules of the Court, because the courts below disposed of important and substantial federal questions in a way that is in conflict with applicable decisions of this Court and have so radically and far departed from the Constitution of the United States and the accepted sound course of judicial procedure as to call for this Court's power of supervision and review to halt the same.

Respectfully submitted,

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APPENDIX.

SUPREME COURT OF SOUTH CAROLINA.

TOWN OF McCORMICK, *Respondent*,

v.

LESTER FOLLETT, *Appellant*.

Case No. 2415.

Opinion No. 15573.

Filed August 26, 1943.

Affirmed.

Grover C. Powell, of Atlanta, Georgia, and C. E. Cooley, of Anderson, for appellant.

J. Fred Buzhardt, of McCormick, and Solicitor Jeff D. Griffith, of Saluda, for respondent.

STUKES, A. J.:

Appellant was convicted in the Mayor's Court of the Town of McCormick and sentenced to pay a fine of $50.00 or be confined in jail for twenty days for violation of a municipal ordinance prescribing an occupational license tax. The classification in which he fell is as follows: "Agents selling books, per day $1.00, per year $15.00."

The instances of violation to which the evidence referred were of the sales of a cloth-bound book entitled "Children" and containing three hundred and sixty-eight pages of text with an elaborate index, purporting to be an edition of three million copies, which cost the purchasers twenty-five cents each, but appellant contended that such price was a contribution. However, he admitted in testimony that he had no other income, living upon the profits of his sales or "contributions", and remitted to the publisher for the books after he disposed of them. The record indicates that he distributed other literature published by the Watch Tower Bible and Tract Society, Inc., of Brooklyn, New York, but the prosecution and conviction involved the

book mentioned, "Children", and only it was given this Court as an exhibit on the argument of the case.

After conviction and sentence, defendant appealed to the Circuit Court of General Sessions upon the ground that the prosecution should have been dismissed because the ordinance as here applied is in violation of the Fourteenth Amendment of the Federal Constitution (extending against the States the prohibitions of the Bill of Rights, the first eight amendments,) in that it restricts freedom of speech, freedom of press and freedom of worship. It was also urged at the trial that there was insufficient testimony of an actual sale or sales of the books within the corporate limits of the Town of McCormick, but that ground was abandoned upon appeal to the Circuit Court. It may be said, however, that the conviction was upon trial by jury and they had ample evidence before them to sustain their finding of sales.

The appeal came before the Honorable E. C. Dennis, presiding Judge, who heard the arguments thereon and took them under advisement for considerable time, afterward filing his order dated November 2, 1942, in which he sustained the conviction. The order is interesting and demonstrates his close study of the record and general careful consideration of the case. From it appellant has brought his appeal to this, the Court of last resort of this State.

We agree with the trial Judge in his observation that our decision of *State* v. *Meredith*, 197 S. C. 351, 15 S. E. 2d 678, is not apposite. There it was found that the defendant was an itinerant minister of Jehovah's Witnesses and the sale by him of a book (apparently a different one from that here involved) in a rural community "was merely collateral to the main purpose in which he was engaged, which was to preach and teach the tenets of his religion", with no profit motive involved. The statute there invoked (the state hawkers and peddlers license law) was properly held inapplicable and the decision of constitutional questions was expressly avoided.

Here the appellant contended in evidence and argument that he is an ordained minister of the same sect and he

introduced in evidence a certificate of such of the Watch Tower Bible and Tract Society, but there is no doubt of the fact, established in evidence, that he earns his living by sale of books, having no other occupation. This clearly takes him out of the rule of *State* v. *Meredith*. It will hardly be contended that any other minister may make his living by the sale of books and, should he engage in his occupation in the Town of McCormick, not be subject to the moderate license of $15.00 per year prescribed by the ordinance under attack.

It may be conceded that the book in question is a religious book. Tested by the tenets of other forms of the Christian religion with which we are familiar, it is full of heresies. But it purports to offer a plan of salvation of the human soul in life after death, based upon quotations from the Bible, so we conclude without difficulty that its publication and distribution come within the meaning of the words, "exercise of religion", as they are used in the constitution. Appellant's sect undertakes to make a now unimportant and obscure distinction between religion and Christianity, and on the back of his certificate of ordination, in evidence, is the following statement with reference to the book: "It is not religious, but fills the sincere heart with contentment and hope. It is not a child's book, but is for adults and children as well. Here is a copy for you, and you may contribute twenty-five cents to help publish more like books. Read CHILDREN, rejoice and live."

It is interesting to note that the able and long-experienced Judge who heard the case on circuit sat as an Acting Associate Justice of this Court in *State* v. *Langston*, 195 S. C. 190, 11 S. E. 2d 1, a case affirming the conviction of other Jehovah's Witnesses of breaches of the peace. In his opinion for the Court he said: "In this State there are so many religious beliefs, so varied in what they teach and with such great differences, that one of the most fruitful, and yet fruitless, sources of argument is some theological question. It certainly cannot be said that there is not in this State an absolute freedom of religion."

For convenient reference, the portion of the first amendment of the Federal Constitution, urged in opposition to the municipal ordinance under review, is here set out:

> "Congress (or a State or subdivision thereof—interpolated) shall make no law respecting an establishment of religion, or prohibiting free exercise thereof; or abridging the freedom of speech, or of the press. • • •"

It seems, and is, a very far cry from the import of the foregoing clause to the occupational license ordinance in question. Does application of the latter to appellant's sale of religious books violate the constitution? Answering similar questions has troubled other Courts. In 141 A. L. R., beginning at page 538, is an enlightening annotation upon the subject following report of the five to four decision in *Jones* v. *Opelika*, and other cases, 316 U. S. 584, 62 S. Ct. 1231, 86 L. Ed. 1174, 141 A. L. R. 514. The following excerpts (pages 540 and 542) from the editorial comment found in the annotation appear to be a fair summary of the decided cases upon the subject up to that time:

> "The effect of the cases, taking them as a whole, seems to be that the sale, and also, presumably, the distribution without charge, of books and pamphlets dealing with religious subjects may be reasonably regulated as to time, place, and manner, without there being any invasion of religious freedom as protected by Federal and State Constitutions. Furthermore, transactions of sale and solicitation of sale of such literature may be subjected to reasonable and non-discriminatory taxation."
>
> "In nearly every case wherein the question has been presented, the view has been taken that a reasonable nondiscriminatory license tax imposed upon the sale of religious literature from door to door is not invalid as an invasion of religious liberty guaranteed by constitutional provisions."

But the Supreme Court of the United States "went up the hill and down again" in its decision of *Jones* v. *Opelika*,

supra, and vacated it in another equally closely divided decision. This action was coincidental with its decision of *Murdock* v. *Pennsylvania* and seven other cases, 63 S. Ct. 870, (advance sheet No. 13, May 15, 1943), also by five to four. Does this last decision of that high Court, whose view is of course controlling upon the question involved, indicate reversal of the conviction and sentence of appellant? After most careful consideration, we do not think so. The facts of the Murdock case are materially unlike those of appellant's, although they appear to be members of the same religious sect. In view of what has been said of the case at bar it would perhaps be sufficient to point out that in the leading opinion in Murdock's case it was clearly said: "The cases present a single issue—the constitutionality of an ordinance which as construed and applied required religious colporteurs to pay a license tax as a condition to the pursuit of their activities." 63 S. Ct. at page 873. On the contrary, in the case at hand, we have the conviction of a resident of a town, the ordinance of which is involved, who earned his living by the sale of books and did so within the town without obtaining the required license, which latter would have cost him $1.00 per day or $15.00 per year. He was literally "selling books," the words of the ordinance.

The Supreme Court in its majority opinion in *Murdock* had in contemplation an itinerant preacher, and expressly referred to such, but this case, so far as the record discloses, does not involve an itinerant. The dictionary definition, and the commonly accepted meaning, of an "itinerant" is one who travels from place to place. However, the appellant was selling books in the town of his residence. "Itinerant", used as an adjective by the Supreme Court, means: "Passing or traveling about the country; going or preaching on a circuit; wandering." Webster's New International Dictionary, Second Edition, Unabridged, G. & C. Merriman Company, 1939. It is certainly not a distortion of the facts (see 63 S. Ct. at page 874) in this case to find, which we do, and hold, as did the lower Courts, that appel-

lant's occupation was that of selling books and not that of colporteur.

Furthermore, the Supreme Court based its acquittal of Murdock partly, at least, upon the ground that, quoting from 63 S. Ct. at page 876, "itinerant evangelists moving through a state or from state to state would feel immediately the cumulative effect of such ordinances as they become fashionable." But there is no evidence in the record as has been pointed out, that appellant was "moving through a state or from state to state." In fact, as has been said, he was convicted for the violation of an ordinance of his home town. We think it clear that the reasoning in Murdock's case is inapplicable to this for the patent reason of the differing facts.

The majority of the Court there said (63 S. Ct. at page 874): "Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital." Undoubtedly, this is such a case but we think the sales proven were more commercial than religious. The license was required for the selling of books, not for the spreading of religion.

The contentions with reference to the constitutional inhibition against abridging the freedom of speech or of the press, are plainly untenable and we think need not be discussed at length. The ordinance is not discriminatory and no effort was made in the Court below or here to show that it is unduly burdensome. In this connection see *Grosjean* v. *American Press Co.*, 297 U. S. 233, 56 S. Ct. 444.

Thus we find no violation of the First Amendment (or the Fourteenth) to the Federal Constitution in the application of the ordinance to appellant and his book selling. It is not, in our opinion, unconstitutional as so applied.

In appellant's extensive brief (eighty-four pages, exclusive of index and table of authorities cited) questions are argued which are based upon provisions of the South Carolina Constitution (of 1895) of similar import to those of the Federal Constitution which have been discussed. However, only the latter were relied upon in the trial court

and are, therefore, properly raised here. What we have said, we think, rightly disposes of appellant's contentions with respect to them.

The exceptions are overruled and the judgment of the Circuit Court affirmed.

BAKER and FISHBURNE, JJ., and T. S. SEASE and E. H. HENDERSON, Circuit Judges, AAJ., concur.

(9065)